AFFIN-ACF FINANCE BHD

v.

PHANG NGAN HEONG

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE HONG GEOK JC
[SUIT NO: D3-22-209-2003]
29 DECEMBER 2009

SALE OF GOODS: *Implied conditions - Implied undertaking as to title - That seller has right to sell goods - Breach of implied undertaking - Seller unable to pass good title to buyer - Whether purchaser could rescind contract - Whether seller entitled to full refund of purchase price paid - Whether there was total failure of consideration - Sale of Goods Act 1957, s. 14(a) - Claim by financier/purchaser against car dealer/seller after car was seized by police as stolen vehicle*

SALE OF GOODS: *Motor car - Contract of sale - Car purchased by financier from dealer and let out to hirer - Car seized by police as stolen vehicle two years after sale - Whether title to car had passed from dealer to financier at point of sale - Whether dealer had good title to pass - Whether registration of car in hirer's name meant good title had passed to financier - Whether ownership of car must remain with financier until end of hire purchase period - Whether financier could recover purchase money from dealer for total failure of consideration - Whether sale contract between dealer and financier superseded by hire purchase agreement between financier and hirer*

The plaintiff (a finance company) brought the present action against the defendant (a motorcar dealer) claiming, *inter alia:* (i) an order that the defendant indemnifies the plaintiff against all claims made or to be made by the hirer of a Honda Accord ('the car') under a hire purchase agreement ('the HPA') between the plaintiff and the hirer; (ii) RM120,200 being the purchase price of the car which was 'paid' by the plaintiff to the defendant; and (iii) RM32,000 as term charges. The action was resisted by the defendant, principally, on the ground that the contract for the sale of the car was between the hirer (as buyer) and the defendant (as seller), and that as such there was no legal nexus between the plaintiff and the defendant. The defendant contended that he was himself a *bona fide* purchaser of the car from a third party (previous owner) and that as such he

had acquired a good title to the car which he could and did transfer to the hirer (in 1997), notwithstanding the fact that the car was subsequently seized by the police (in 1999) and confirmed to be a stolen vehicle. The defendant also pointed out that he had never received a lump sum of RM120,200 from the plaintiff; that he was paid RM40,200 directly by the hirer as a down-payment and that only the balance of RM80,000 was paid by the plaintiff after the hire purchase loan was approved.

Held (allowing the action in part):

(1) The contract for the sale of the car was between the plaintiff (as purchaser) and the defendant (as seller). The car was then let or hired out to the hirer under the HPA. This was evident from Sch. A of the HPA which described the plaintiff as the 'owner', the defendant as the 'dealer/seller' and the hirer as the 'hirer'. The down-payment paid directly by the hirer to the defendant was only a deposit towards the hire purchase. (*Chan Hoon Piaw & Anor v. Cempaka Finance Bhd*) (paras 26 - 29)

(2) From the evidence, it was clear that the car was a stolen vehicle with tampered engine and chassis numbers. (para 30)

(3) The registration of the car in the name of the hirer was irrelevant as it did not amount to the passing of a good and valid title from the defendant to the plaintiff. For that to happen, it would be necessary for the plaintiff to continue to have a good and valid title to the car until the end of the hire purchase period so that it could, in turn, pass a good and valid title to the hirer. The seizure of the car by the police had dispossessed the plaintiff of the car thus making it impossible for the plaintiff to pass any title to the hirer later. In any case, a passing of ownership at the time of the sale alone would be insufficient; the ownership had to continue to remain with the plaintiff for there to be a meaningful passing of ownership. (paras 31, 41)

(4) Pursuant to s. 14(a) Sale of Goods Act 1957, there was an implied condition on the part of the defendant (as seller) that he would have the right to sell the car. As that condition had been broken, the plaintiff could (as purchaser) rescind the contract and demand a return of the purchase money. The plaintiff had the right to sue the defendant for the purchase

price paid as money had and received on a total failure of consideration. The very identity of the car allegedly sold was questionable. (*Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin*) (paras 32, 41 & 42)

(5) The contractual relationship between the plaintiff and the defendant had not been superseded by the HPA between the plaintiff and the hirer. (*Ahmad Ismail v. Malaya Motor Co & Anor*) (paras 33 - 38)

(6) Limitation would now preclude the hirer from filing any claims against the plaintiff; the plaintiff's claim against the defendant for an order of indemnity should therefore be dismissed. The plaintiff, however, was entitled to a refund of the entire purchase price of the car from the defendant, *ie*, RM120,200; it was immaterial that the defendant only received RM80,000 from the plaintiff and the a down-payment of RM40,200 had already been paid directly by the hirer to the defendant. The plaintiff's claim against the defendant for term charges amounting to RM32,000 would fail as it arose from the HPA between the plaintiff and the hirer to which the defendant was not a party. (paras 42, 43 & 44)

Case(s) referred to:

Ahmad Ismail v. Malaya Motor Co & Anor [1973] 1 LNS 1 FC ***(dist)***

BBMB Kewangan Bhd v. Tan Swee Heng & Anor [2002] 7 CLJ 377 HC ***(Not foll)***

Chan Hoon Piaw & Anor v. Cempaka Finance Bhd [2003] 1 CLJ 762 HC ***(foll)***

Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin [2001] 1 CLJ 768 HC ***(foll)***

MBF Finance Bhd v. Low Ping Ming [2005] 1 CLJ 305 CA ***(refd)***

Legislation referred to:

Hire Purchase Act 1967, s. 6(1)(b)

Sale of Goods Act 1957, s. 14(a)

For the plaintiff - JK Lim (SP Lai with him); M/s Soo Thien Ming & Nashrah

For the defendant - Rudeen Chua; M/s Rajendran & Deen

Reported by Gan Peng Chiang

A

JUDGMENT

Amelia Tee Hong Geok JC:

[1] The plaintiff, Affin-ACF Finance Berhad, is a licensed financial institution formerly known as Asia Commercial Finance (M) Berhad. The defendant, Phang Ngan Heong, is a sole proprietor carrying on business under the name and style of Syarikat Kereta Kwong Yeu.

B

[2] The plaintiff's claim against the defendant is for:

C

i. An order that the defendant indemnify the plaintiff against all claims made or to be made by Chin Yu Shen, the hirer, arising out of the hire purchase agreement No. 027-10-06586-2 in respect of a Honda Accord car registration no. WDK 6677;

D

ii. RM120,200 being the cost of the said vehicle paid by the plaintiff to the defendant;

iii. RM32,000 as term charges; and

E

iv. Interests and costs.

[3] The plaintiff's claim is disputed by the defendant who states that he had entered into a contract of sale with Chin Yu Shen and not the plaintiff. As such, he contends that there is no legal nexus between him and the plaintiff in respect of the said car. Further, the defendant pleads that he is a *bona fide* purchaser of the vehicle from Chin Ken Koon and had conducted a physical examination including verification of the engine and chassis numbers before its purchase. He claimed to have valid possession and ownership of the vehicle to effect a transfer from the previous owner to Chin Yu Shen.

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The Plaintiff's Case

[4] The plaintiff called two witnesses in support of its case. Ng Suit Huei (PW1) was the senior executive in the Credit & Marketing Department of Affin Bank Berhad ("the bank"). The plaintiff was formerly known as Asia Commercial Finance (M) Berhad. On 13 March 2001, it changed its name to Affin-ACF Finance Berhad. *Vide* a vesting order dated 26 May 2005, the whole business of Affin-ACF Finance Berhad was transferred to and vested in Affin Bank Berhad with effect from 1 June 2005.

H

I

[5] PW1 was previously with the credit processing department of the bank and his duties then included the processing of hire purchase loan applications, checking and verification of documents submitted for loan applications, conducting credit checks and physical inspection of second hand vehicles.

[6] PW1 testified that by way of an agreement dated 5 November 1997 between the plaintiff and the defendant, the plaintiff agreed to purchase and the defendant agreed to sell a Honda Accord car registration no. WDK 6677 for a total consideration of RM120,200. This figure comprises a purchase price of RM118,000, a transfer fee of RM150 and insurance premium of RM2050. He disagreed with the suggestion that the purchase price was only RM118,000.

[7] Chin Yu Shen, the hirer, had applied for, and was approved, a hire purchase loan from the plaintiff to finance the purchase of the car. The loan amount was RM80,000 with term charges of RM32,000 repayable by 60 monthly installments of RM1,867 per month commencing on 12 December 1997 and a final installment of RM1,847.

[8] PW1 disputed the defendant's contention that the contract of sale of the vehicle was between the defendant and Chin Yu Shen, the hirer. He testified that the contract was between the plaintiff and the defendant as evidenced by the sales invoice. He argues that the defendant was aware about the hire purchase agreement between the plaintiff and Chin Yu Shen where it was stated in the second schedule that the plaintiff agreed to be a party "as owner". Further it was confirmed at item 5 of schedule A that the dealer/seller of the car was the defendant. The hirer paid RM40,200 directly to the defendant on account of the bank and the plaintiff then issued a cheque for RM80,000 for the balance. The plaintiff also paid the defendant a commission of RM640. Ownership of the vehicle was then transferred to the plaintiff. It is noted that although the car was registered in the name of Chin Yu Shen, ownership was claimed by the plaintiff.

[9] PW1 testified that on or about 30 August 1999, the car was seized from the hirer by the Police from Ibu Pejabat Polis Kontinjen Kuala Lumpur on suspicion that it was a stolen vehicle. Subsequently, *vide* a letter dated 10 November 1999 (P1), the Police informed the hirer that their investigations had been

A completed. According to a report from the Chemistry Department, it was confirmed that the chassis of the vehicle had been tampered with and the identity of the car was actually WDR 8478 which had been reported as stolen.

B **[10]** What followed next was that Capital Insurance Berhad provided supporting documents to claim the vehicle (actual registration no. WDR 8478) and the car was to be delivered to its agent, Lam Koong Sum. The car was eventually collected by Cheah bin Sin who was duly authorized by Lam Koong Sum to do so.

C **[11]** *Vide* a letter dated 14 March 2000 (P3), the plaintiff informed the defendant that the vehicle had been detained by the Police and that the findings of the Chemistry Department was that the chassis number had been tampered with. The defendant was further informed that police investigations revealed that the vehicle had D been reported stolen. The bank informed the defendant that he was liable and requested him to provide a proposal for settlement. No response was received from the defendant. A letter from the plaintiff's solicitors demanding a full refund of the purchase price of the vehicle by reason of the total failure of consideration also E evoked no response. Hence the present suit.

[12] PW1 told the court that when the plaintiff purchased the vehicle from the defendant to hire to the hirer, it had expected to acquire "a legitimate and genuine vehicle free from encumbrances". F The defendant as seller should have a good title to sell the vehicle.

[13] The plaintiff disputes the defendant's contention that they were negligent in not ascertaining the actual ownership of the vehicle before purchasing it. He confirms that normally the plaintiff G was much more cautious about engine and chassis numbers when dealing with used cars. In this case, all the standard procedures of vetting and processing hire purchase loans had been exercised by the plaintiff. All reasonable precautions had been taken to ensure that the vehicle was genuine and legitimate. A physical inspection H was conducted on 6 November 1997 to verify that the engine and chassis numbers tallied with the registration card and valuation report to ensure that the vehicle could be registered in the name of the hirer. The loan was released only after the transfer was effected by the Road Transport Department on 8 November 1997.

I

[14] In cross-examination, PW1 agreed that since the registration was successful, at that time good title to vehicle WDK 6677 had passed to the hirer. He agreed that the sale of the car was concluded when the full purchase price was made and the car was transferred to the hirer. He further agreed that the hirer had not taken any action against the plaintiff for not passing him a good title. Neither had he sued for the return of his money.

[15] Sgt Mohd Yusof bin Abu Bakar (PW2) was the police officer involved in the arrest of a male Chinese named Lee Ming Hart and the seizure of a Honda Accord WDK 6677 on 30 August 1999. After the arrest, he was directed by ASP Ng Siew Yang to send the car to the Chemistry Department in Petaling Jaya. The Chemistry Report dated 10 September 1999 (P5) issued by the Chemist Lim Kieng Chwee states that the engine as well as the chassis numbers of the vehicle had been tampered with. The original chassis number, after the removal of the paint on the number, was CD4-702055 and the original engine number was MA422 202074.

The Defendant's Case

[16] The defendant, Phang Ngan Heong (DW1), is the sole proprietor of Syarikat Kereta Kwong Yue. He commenced his business on 1 May 1980 and thus his second-hand car business would have been operating for some 29 years.

[17] According to the defendant, he bought the vehicle, a Honda Accord registration No. WDK 6677 from one Chin Ken Koon. The court notes that no documents or information was available from the defendant as to the date of the purchase or the amount that he paid for it. He testified that he had verified the engine and chassis numbers through physical inspection to ensure that they were consistent with the registration card. In addition, he made a search at the Road Transport Department to confirm that it was an original registration card for a valid and genuine vehicle. He testified that the information in the registration card of the said vehicle was consistent with the physical details of the car and confirmed by the Road Transport Department to be true and genuine.

[18] The defendant testified that he had sold the vehicle to an individual named Chin Yu Shen at a price of RM120,200 inclusive of insurance premium and transfer fee. He identified the sales invoice dated 5 November 1997 (p. 8 of NAB 1) as that issued by him in relation to the sale. The purchaser paid a down payment of

A RM40,200 and applied for financing from the plaintiff. The defendant received the balance of the purchase price from the plaintiff *vide* MBB cheque No. 332815 on 12 November 1997 and the vehicle was successfully transferred to Chin Yu Shen on 8 November 1997 as reflected in the registration card.

B

[19] The defendant claimed that he had no knowledge about the seizure of the car by the Police. He did not receive any claim from any party in relation to the car and insisted that he did not receive any letter of demand from the plaintiff's solicitors. He had no C knowledge of the police report lodged in respect of the loss of vehicle WDR 8478 or the registration particulars of that vehicle.

[20] The defendant disputed any involvement with the hire purchase agreement which was strictly between the plaintiff and the hirer and he denied any responsibility to the plaintiff in this regard. D In any event, he argued that he had taken all reasonable steps by carrying out the necessary inspection and search with the relevant parties before buying the vehicle from the previous owner. He argued that Chin Yu Shen had enjoyed quiet and peaceful possession of the vehicle as ownership was successfully transferred to E him. This would show that the Road Transport Department had conducted the necessary investigations and had found that the vehicle could be so registered.

[21] The defendant complained that the action filed against him F was unreasonable and without basis as he was not responsible for tampering with the engine and chassis numbers of the vehicle, if indeed they were tampered with. He alleged that the plaintiff was itself negligent when it failed to take the necessary action to ascertain that the vehicle was genuine.

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[22] The defendant pointed out that he had never received RM120,200 from the plaintiff. He had received RM40,200 from Chin Yu Shen and the balance of RM80,000 from the plaintiff through hire purchase facilities. In any event, no claim has been H made by Chin Yu Shen over the loss of his rights to the vehicle. However, during cross-examination, he agreed that the sales invoice at p. 8 of NAB2 confirms that he had received a sum of RM120,200 as the purchase price of the car. He agreed that the RM40,200 was paid to him by the hirer on behalf of the plaintiff. I He farther agreed that he had sold the car to the plaintiff and had introduced Chin Yu Shen to the plaintiff for the purpose of obtaining a hire purchase loan.

[23] Despite being shown P1, the letter from the Police informing that the report from the Chemistry Department confirmed that the chassis of the vehicle had been tampered with and that the identity of the car was actually WDR 8478 which had been reported as stolen, the defendant disputed that the engine and chassis numbers of WDK 6677 had been tampered with and offered the weak and illogical protest that "he did not know".

Evaluation And Findings

[24] In coming to a decision in this case, I have carefully considered the evidence adduced by both parties as well as the submissions and authorities tendered in support of their respective cases.

[25] In cases of this nature which involves an individual who wishes to purchase a car from a dealer but requires financing to be able to do so, there would necessarily be three parties in the equation. In this case, Chin Yu Shen was desirous of buying Honda Accord WDK 6677 from the defendant, a second hand car dealer carrying on business under the name and style of Syarikat Kereta Kwong Yue. Chin Yu Shen required financing and was introduced to the plaintiff for his financing needs. There was evidence that the plaintiff subsequently paid RM640 to the defendant as commission for the introduction.

[26] The court agrees that there would be two separate transactions in this case. First, there is the sales transaction involving the sale of the vehicle WDK 6677 from the defendant to the plaintiff. The court has considered para. 3.4 of the amended statement of defence where the defendant pleads that it had sold the said car to Chin Yu Shen and that its sales contract is with Chin Yu Shen and not the plaintiff. It is clear that the defendant's contention is not supported by case law.

[27] In the case of *MBF Finance Bhd v. Low Ping Ming* [2005] 1 CLJ 305, the respondent company had purchased a vehicle from Avian Engineering Malaysia Sdn Bhd ("Avian"). It paid a deposit of RM35,000 but had to take a loan from the appellant under hire purchase for the balance of RM160,000. The vehicle was registered in the name of the respondent but with an ownership claim by the appellant in the registration card. Subsequently, the respondent defaulted in payments and the vehicle was re-possessed. The court held, *inter alia*, that the endorsement of ownership claim on the registration card of the vehicle meant that the respondent could not

A deal with the vehicle without the consent of the appellant as it did not have a claim or title to the vehicle. That made the appellant the owner of the vehicle and his claim would prevail over that of the respondent even though the latter was registered as the owner.

B **[28]** Similarly in the case of *Chan Hoon Piaw & Anor v. Cempaka Finance Bhd* [2003] 1 CLJ 762, the High Court held that the down-payment by the 1st defendant to the motorcar dealer did not vest the 1st defendant with the ownership of the motorcar. The down-payment was only a deposit towards the hire-purchase and even the C fact that it was paid to the car dealer prior to the execution of the hire-purchase agreement did not render the agreement void.

[29] I am satisfied that in this case the contract of sale is between the defendant as seller and the plaintiff as purchaser. The vehicle was subsequently let or hired out to Chin Yu Shen under a hire D purchase agreement. A close look at Schedule A of the said agreement would reveal that Chin Yu Shen was described as "Hirer", the defendant as "the dealer/deller" whilst the plaintiff with its address at 22, Jalan 3/32, 6th Mile Off Jalan Kepong was described as the "Owner". E

[30] Notwithstanding the defendant's perverse insistence that there was no evidence that vehicle WDK 6677 was a stolen car with tampered engine and chassis numbers, the court finds that the plaintiff has satisfactorily established that the vehicle that was F bought from the defendant was later seized from the hirer by the Police. The court is also satisfied from the evidence of PW2 supported by exh. P1 that the Chemistry Department had ascertained that vehicle WDK 6677 was in reality WDR 8478 whose chassis number had been altered. Apart from a bare denial, the G defendant has adduced no evidence whatsoever to disprove this finding.

[31] As such, the key issue to be determined by the court is whether the defendant could have and did pass a good and valid H title to the plaintiff following the sale of the vehicle. The defendant has argued that it did pass a good title at that time as the vehicle was successfully registered in the name of the hirer by the Road Transport Department. With regret, the court does not find that the registration of the vehicle in the name of the hirer amounts to I passing on a good and valid title. To discharge that responsibility, the plaintiff should have continued to have a good and valid title so that at the end of the hire purchase period, when the hirer has

completed paying all the installments under the hire purchase agreement, the plaintiff would be able, in turn, to pass a good and valid title to the hirer. The seizure of the vehicle by the Police and its subsequent return to the rightful owner meant that the plaintiff no longer had physical possession of the vehicle and would be in no position to pass on any title to the hirer.

[32] The plaintiff has referred the court to the case of *Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin* [2001] 1 CLJ 768 where the car bought by the plaintiff was subsequently seized by the police for being a stolen vehicle. The plaintiff sued for the return of the purchase price. The defendant resisted the claim on the grounds that he was a *bona fide* purchaser of the car with no knowledge of any defects relating to ownership. It was held by KC Vohrah J that there was an implied condition on the part of the defendant under s. 14(a) of the Sale of Goods Act 1957 that he had the right to sell the car. Since the defendant did not have the right to possession of the car, he could not consequently give it to the plaintiff. The court held that the plaintiff had the right to sue for the price paid as money had and received on a total failure of consideration.

[33] The defendant has in turn drawn the court's attention to the case of *Ahmad Ismail v. Malaya Motor Co & Anor* [1973] 1 LNS 1 as an authority for the proposition that the sales agreement between the plaintiff and the defendant has been superseded by the hire purchase agreement and therefore the plaintiff has no claim against the defendant. However, upon a careful reading, the Federal Court decision in *Ahmad Ismail (supra)* can clearly be distinguished.

[34] In the case of *Ahmad Ismail (supra)*, the appellant had decided to purchase a second hand Morris bearing registration no. BW 343 from the first respondent, a car dealer, for RM4,900. He traded in his own car for which he was given a credit of RM1,200. He also paid the first respondent RM1,000 in cash. He was to pay up the balance before a certain date or else his deposit of RM1,000 would be forfeited. As the appellant was still short of RM2,700, he entered into a hire purchase agreement with the second respondent, a finance company. Under the agreement, the appellant was to pay the second respondent monthly installments of RM150 each. He paid four installments but stopped paying when his car was detained by the police on suspicion that it was a stolen vehicle.

[35] During the course of police investigations, the police had offered to return the car to the appellant subject to conditions. This was refused by the appellant who, through his solicitors, then terminated the hire purchase agreement by letter. The appellant sued both respondents for damages for breach of contract alleging breach of s. 6(1)(b) of the Hire Purchase Act 1967.

[36] The appellant's case against both respondents was dismissed by the learned President of the Sessions Court. His appeal to the High Court was also dismissed. On further appeal, the Federal Court held, *inter alia*, that:

> The first ground of appeal concerns only the first defendant. It is said that the learned appellate judge was wrong in holding that there remained no contractual relationship between the plaintiff and the first defendant. It is said that despite the existence of the hire-purchase agreement there still remained a contractual relationship between the two of them and that the learned appellate judge should have held that the first defendant had only assigned his rights in the car to the finance company.
>
> We regret we cannot accept this argument. It is true that by exhibits P1 and P2 there was a sale by the car dealer of the car to the plaintiff on certain conditions. But ultimately those documents were superseded by the hire-purchase agreement exhibit P3 and from the language of this document it is plain that the car dealer faded out of the picture and the only contract that remained then was between the plaintiff and the finance company, and accordingly the plaintiff has no claim against the car dealer.

[37] In *Ahmad Ismail*'s case, the claim for damages was made by the appellant who was the hirer in the hire purchase transaction. The Federal Court held that the appellant's case was superseded by the hire purchase agreement. In our instant case, the action was filed by the owner/financer who had purchased it from the dealer. Although there was a subsequent hire purchase transaction between the owner and the hirer, ownership of the vehicle had yet to pass to the hirer. The relationship between the plaintiff and the defendant remains as buyer and seller. There was no superseding by the hire purchase agreement.

[38] In *Ahmad Ismail*'s case, the appellant failed in his action against the second respondent, the owner, when the Federal Court held that there was no anticipatory breach of contract as there was no act by the second respondent which made it obvious that it had renounced its liabilities under the contract or that it had become

impossible for him to perform. In that case, there was no proof that the car had been stolen and in fact the car was subsequently returned to the second respondent without conditions. In our instant case, the vehicle was confirmed by the Police to be a stolen vehicle and subsequently returned to its rightful owners.

[39] The defendant has also relied on the case of *BBMB Kewangan Bhd v. Tan Swee Heng & Anor* [2002] 7 CLJ 377 in support of his contention that the doctrine of caveat emptor would apply in this case. He contends that PW1 had admitted that sufficient inspection had been carried out before the loan was disbursed and this includes checks as to the engine and chassis numbers. On the defendant's part, he states that he too had also done all the requisite checks and on that basis he cannot now be faulted.

[40] In perusing the decision of *BBMB Kewangan Bhd (supra)*, we must not lose sight of the fact that in that case, the appellant/finance company had sued both the hirer as well as the dealer for the balance unpaid under the hire purchase agreement. The 1st respondent/hirer had counter claimed for breach of conditions and warranties arising out of the hire purchase agreement. In finding against the appellant in respect of its claim against the 2nd respondent/dealer, the High Court had agreed with the magistrate that the transaction between the appellant and the 2nd respondent was one of a sale of goods transaction, that is, an outright sale of the vehicle from the 2nd respondent to the appellant. He held that:

> The characteristic of the said sale is that an offer has been made by the 2nd respondent to the appellant; the appellant had done some inspection and investigation on the status and condition of the said vehicle; the appellant agreed to accept the offer for sale and made the necessary payment to the 2nd respondent. The property or ownership title of the said vehicle passed at the time when the sale price was fully paid, just before the appellant entered into the hire purchase agreement with the 1st respondent in respect of the same subject matter. The doctrine of "caveat emptor" (let the buyer beware) is applicable against the appellant.

[41] The court has carefully perused the above authority but regret that it is unable to agree with it. The court finds that since vehicle WDK 6677 was in reality WDR 8478, the defendant in this case would not be able or capable of passing on ownership or title of WDK 6677 to the plaintiff. The court is in favour of following the decision in the case of *Lian Lee Motor (supra)* where the High Court

rejected the defendant's defense of *bona fide* purchaser without knowledge of any defects as to ownership. The court agrees with the decision of KG Vohrah J that there is an implied condition on the part of the defendant under s. 14(a) of the Sale of Goods Act 1957 that he had the right to sell the vehicle. The court finds that it is irrelevant that that following the sale, the car was successfully registered in the name of the hirer by the Road Transport Department. In light of the fact that the car was subsequently seized by the police and has now been returned to its rightful owner, it follows there from that the plaintiff no longer has possession of the vehicle and would not have been able to pass on ownership of WDK 6677 to the hirer at the close of the hire period under the hire purchase contract. The court finds that the passing of ownership at the time of the sale alone is insufficient. The ownership must continue to remain with the plaintiff for there to be a meaningful passing of ownership. In this case, the court finds that there has been a total failure of consideration as the very identity of the property allegedly sold is questionable.

Conclusion

[42] The plaintiff has prayed for an order of indemnity from the defendant in respect of all and any claims made or to be made by Chin Yu Shen arising from the hire purchase agreement dated 12 November 1997. The court notes that on 10 February 2003 when the action was filed by the plaintiff, the limitation period for the said Chin Yu Shen to file a suit against the plaintiff had not yet lapsed. However, it is now confirmed by the plaintiff that Chin Yu Shen had not filed any action against the plaintiff even as at the date of the hearing in 2009. His claim is now clearly time barred under the Limitation Act 1953. The court agrees with learned counsel for the defendant that since Chin Yu Shen is now time barred from making any claim against the plaintiff, the plaintiff cannot succeed in his claim for an indemnity from the defendant. Accordingly, the plaintiff's claim for indemnity from the defendant under para. (a) is dismissed.

[43] The court has found that there was a total failure of consideration in the sales contract between the plaintiff and the defendant. The very identity of the vehicle WDK 6677 sold by the defendant has now been disproved. The vehicle WDK 6677 does not exist since it is in reality another vehicle WDR 8478. Based on the evidence and cited authorities, the court finds that the plaintiff is entitled to a refund of the total purchase price of the vehicle. It is

immaterial that the sum of RM40,200 was paid by the hirer as deposit as that sum constitutes part of the total purchase price for the vehicle and was paid by the hirer for and to the account of the plaintiff. It is also immaterial that the hirer had paid installments to the plaintiff and had the use of the car for the period prior to its seizure by the police. That is solely a matter between the plaintiff and Chin Yu Shen.

[44] Accordingly, the court allows the plaintiff's claim under para. (b) and hereby orders the defendant to pay a sum of RM120,200 to the plaintiff with interest at 8% from the date of judgment until full satisfaction and costs. The plaintiff's claim for RM32,000 in respect of term charges is dismissed. The term charges arose from the hire purchase agreement between the plaintiff and Chin Yu Shen and to which the defendant was not a party.